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RECENT DECISIONS.

ADMINISTRATIVE LAW—PRIMARY CONTESTS—JUDICIAL CONTROL.—Plaintiff was a candidate for the Republican nomination as sheriff, and, according to the canvass of the votes made by the party county committee, was defeated. He applied to the court, alleging facts which, if true, clearly showed that he had received a majority of the legal Republican votes at the primary. *Held*, the court would refuse to take jurisdiction, the plaintiff's remedy being an appeal to the governing authority of the party which by statute had final jurisdiction of primary contests. *Whitaker* v. *Swanner* (Ky. 1905) 89 S. W. 184. See NOTES, p. 270.

BANKRUPTCY—DUTIES OF THE BANKRUPT.—The president of a bankrupt company was directed to make known to the trustee the combination of a safe alleged to belong to the bankrupt company. *Held*, the order must be complied with. *Matter of Hooks Smelting Co.* (Pa. 1905) 15 Am. Bank. Rep. 83.

A trustee in bankruptcy by operation of law is vested in the property of the bankrupt. *Leighton* v. *Harwood* (1872) 111 Mass. 67; National Bankruptcy Act, 1898 § 70. It is an offense for the bankrupt to conceal any property. § 29. As a bankrupt must submit to an examination as to the amount, kind, and whereabouts of his property, § 7, a United States district court, as a court in bankruptcy, clothed with all the powers of a court of equity, can compel him as a witness, to answer questions put to him in regard to his assets, *In re Salkey* (1875) 21 Fed. Cas. 255, or to account for the assets themselves. *In re Deuell* (1900) 100 Fed. 633.

CARRIERS—EXTRA-TERMINAL LIABILITY FOR FREIGHT.—Goods of the plaintiff, marked to a destination beyond the defendant's line and accepted by it for transportation, were lost by a connecting carrier. *Held*, the defendant was not liable. *Pittsburg etc., Ry. Co.* v. *Bryant* (Md. 1905) 75 N. E. 829.

Although the English view that a carrier, by the acceptance of goods marked to a point beyond its terminus, assumes responsibility for their through transportation, *Muschamp* v. *Railroad Co.* (1841) 8 M. & W. 421; *Railroad Co.* v. *Collins* (1858) 7 H. L. Cas. 194, is not without support in this country, *Railroad Co.* v. *Frankenburg* (1869) 54 Ill. 88; *Railroad Co.* v. *Mt. Vernon Co.* (1887) 73 Ala. 173, the majority of courts, apparently induced by considerations of great distances, *Clyde* v. *Hubbard* (1879) 88 Pa. St. 358, and, in earlier cases, of difficulties in transportation, *Van Santvoord* v. *St. John* (N. Y. 1843) 6 Hill 146, have applied the rule of the principal case. *Gray* v. *Jackson* (1871) 51 N. H. 9. This rule, though mitigated to some extent by the presumption that the goods have been safely received by the final carrier, *Moore* v. *Railroad Co.* (1899) 173 Mass. 335, is unduly severe upon the shipper and the condition it implies in the contract of carriage is not to be sustained as an implication of fact.

CONSTITUTIONAL LAW—ADMINISTRATION—ESTATES OF ABSENTEES.—A Pennsylvania statute permitted the orphans' court, upon proper application and after due notice by publication, to issue letters of administration upon the estate of any person absent for more than seven years from his last domicile within the state and presumed to be dead by the court. Provision was made for revoking the letters and indemnifying the absentee in case of his return. *Held*, the statute was not unconstitutional. *Cummins* v. *Reading School District* (1905) 198 U. S. 458. See NOTES, p. 267.

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT OBLIGATION—ACTUAL LOSS.—The defendant was execution purchaser at a sale to satisfy a judgment on a contract. At the time of the inception of the contract, a judgment debtor was allowed six months in which to redeem from execution sale. At the time of the sale, a subsequent statute had extended the time to twelve months. In a suit by the judgment debtor to redeem, brought after the six months but before the year, the defendant claimed that he held the title to the property under the first statute. *Held*, the subsequent statute was unconstitutional as to contracts made under the prior statute. There was no inquiry as to whether the judgment creditor had received full satisfaction from the proceeds of the sale. *Welsh* v. *Cross* (Cal. 1905) 81 Pac. 229. See NOTES, p. 262.

CONSTITUTIONAL LAW—PRIMARY ELECTIONS—EQUAL PROTECTION.—A primary election law prescribed that the two parties which cast the highest number of votes in the preceding general election should nominate candidates by the direct primary method, and of these two, the one having polled the greater number should hold its primary first in point of time. The plaintiff objected that the fourteenth amendment was violated by applying the primary law to two parties only, and by requiring one to hold its primary before the other. *Held*, the law was constitutional. *Kenneweg* v. *Alleghany County Com'rs* (Md. 1905) 62 Atl. 249.

As the right of suffrage is not impaired by a reasonable regulation of the method of voting, *Dewalt* v. *Bartley* (1891) 146 Pa. St. 529, primary elections may be reasonably regulated by statute. *People* v. *Democratic Com.* (1900) 164 N. Y. 335. Both the restriction of the law to two parties and the time prescribed for holding the primaries are obviously reasonable; and since, in addition, they apply equally to all parties under the same circumstances, they are constitutional. *Ladd* v. *Holmes* (1901) 40 Ore. 167; 3 COLUMBIA LAW REVIEW 51.

CRIMINAL LAW—DEFECTIVE INDICTMENT—PLEA OF GUILTY.—The defendant was arraigned upon an indictment which did not state facts sufficient to constitute a crime. He pleaded guilty and, after judgment, brought a writ of error setting forth the insufficiency of the indictment. *Held*, a defective indictment could not support a conviction and might be attacked even after plea of guilty and judgment thereon. *Klawanski* v. *People* (Ill. 1905) 75 N. E. 1028.

This decision is in accord with the authorities, *Fletcher* v. *State* (1851) 12 Ark. 170; *Boody* v. *People* (1880) 43 Mich. 34, and is based upon the theory that a plea of guilty confesses only the facts charged, and does not constitute a waiver of or cure for defects unless they be purely formal. *Casper* v. *State* (1875) 27 Oh. St. 572. See *Com.* v. *Kennedy* (1881) 131 Mass. 584. The same reasoning should properly apply to a case where a verdict of guilty is returned after a plea of not guilty, but the weight of authority is that in such a case the verdict cures even substantial defects. In 5 COLUMBIA LAW REVIEW 237 the conclusion was reached that this doctrine was unsound and the reasoning of the principal case is strongly confirmatory of this view, especially as the Court decides the case aside from the constitutional question involved.

CRIMINAL LAW—FORMER JEOPARDY—CONVICTION OF HIGHER OFFENSE ON NEW TRIAL.—Upon a complaint of murder in the first degree, a court of first instance in the Philippine Islands without a jury acquitted the accused of murder and convicted them of assault. The Supreme Court of those islands, on appeal to it by the defendants, reversed the judgment and convicted them of murder in the second degree. Congress practically extended the constitutional provision regarding jeopardy to the Philippines. The case was treated as if it arose in a Federal court in this

country and was remanded for a new trial. *Held*, the conviction was legal. Four justices dissented. *Trono* v. *United States* (1905) 26 Sup. Ct. Rep. 121. See NOTES, p. 261.

DOMESTIC RELATIONS—ADOPTION—RIGHT OF ADOPTED GRANDCHILD TO INHERIT.—A. adopted the child of his deceased daughter, and afterwards died intestate. The Statute of Adoption prescribed that the adopted child "shall have all the rights of a child and heir of the adopting parent," and continued, "Provided, that if such adopting parent shall have other children, the adopted shall share the inheritance only as one of them." *Held*, the adopted child inherited as child only and not also as grandchild. *Morgan* v. *Reel* (Pa. 1905) 62 Atl. 253.

The purpose of a proviso is to limit the right given in the enacting clause, *Minis* v. *United States* (1841) 15 Peters 423, which in this case was the right to inherit from the adoptive parent. The right to inherit from natural kindred, being an independent right, was not expressly taken away. Nor was this right taken away by implication, since by adoption a child gets only rights expressly given by statute, *Commonwealth* v. *Nancrede* (1859) 32 Pa. St. 389, and loses only rights expressly taken away. *Wagner* v. *Varner* (1879) 50 Ia. 532; *Clarkson* v. *Hatton* (1897) 143 Mo. 47; Maxwell, Interpretation of Statutes 399. Therefore, the adopted child should inherit from its adoptive father and from its natural grandfather, though represented in the same person. *Wagner* v. *Varner*, supra. But see *Deiano* v. *Bruerton* (1889) 148 Mass. 619.

DOMESTIC RELATIONS—ANTENUPTIAL SETTLEMENT—DISPROPORTIONATE CONSIDERATION.—The plaintiff released some of her widow's rights in the estate of her intended husband for a disproportionate consideration. *Held*, the evidence that she knew the extent of his estate was insufficient to overcome the presumption of designed concealment raised by the disproportion to his estate of the consideration she received. *Murdock* v. *Murdock* (Ill. 1905) 76 N. E. 57.

In the earlier cases equity enforced antenuptial settlements when they were fair and reasonable in view of all the circumstances. *Gould* v. *Womack* (1841) 2 Ala. 83. In acting on this principle some later cases, emphasizing the confidential relations of the parties, *Kline's Estate* (1870) 64 Pa. St. 122, hold that a disproportion of consideration by itself gives rise to a presumption of fraud. *Warner's Estate* (1904) 210 Pa. St. 431. The more liberal early rule seems the better in principle and practice. A reasonable provision for the children of a former marriage might well render the consideration of a marriage settlement technically disproportionate without making the settlement inequitable. See *Hafer* v. *Hafer* (1885) 33 Kan. 449.

DOMESTIC RELATIONS—DOWER—CONVEYANCE IN CONTEMPLATION OF MARRIAGE.—A widower, about to leave home, conveyed without consideration all his land to his children, dividing it substantially as the law would have done at his death but reserved a life estate to himself. Shortly afterwards, while visiting, he was introduced to a woman whom, two days later, he married, representing himself to be the owner of the property he had conveyed. *Held*, the deed, being made in contemplation of marriage, was void as to the wife. *Higgins* v. *Higgins* (Ill. 1905) 76 N. E. 86.

The marital rights of either a husband or wife are now equally protected against conveyances made in contemplation of marriage. *Chandler* v. *Hollingsworth* (1867) 3 Del. Chan. 99. Although a formal engagement is not necessary to constitute "contemplation of marriage," *Baird* v. *Sterne* (Pa. 1882) 15 Phila. 339; *Goddard* v. *Snow* (1826) 1 Russ. 485, the principal case seems alone in extending the doctrine to a case where there is no definite person in mind, but only a general intent to marry. But by

analogy to decisions holding void a conveyance made with a general intent to defraud creditors, *Littleton* v. *Littleton* (N. C. 1835) 1 D. & B. Law. 327, 333, the principal case would seem to be sound. But see *Bliss* v. *West* (N. Y. 1890) 58 Hun 71.

DOMESTIC RELATIONS—GUARDIANSHIP OF INFANT—RELATIVE'S PREFERENCE.—A British subject resident in America, gave, at her birth, into the custody of the defendants, citizens of the United States but strangers by blood, his infant daughter, now six years old. The relator, the infant's aunt and a British subject, seeks the custody of the child, the father having died. The evidence showed that with the relatives the child's chances of obtaining an education and inheriting wealth would be considerably greater than with the defendants with whom she must work to support and educate herself. *Held*, the matter being discretionary with the court, it would not transfer the custody of the child to the aunt. *Mahon* v. *People* (Ill. 1905) 75 N. E. 768.

Guardianship by nature, according to Coke of counsel in *Ratcliffs Case* (1592) 2 Co. 37a, 38a, permitted that "every ancestor, male or female, should have the wardship of his heir apparent, male or female." However, the extension of this principle to children standing in relations other than that of heirs apparent, had no basis in common law, and when so extended seems to have meant no more than that it was a good rule by which to regulate the guardianship, where positive law was silent, the whole matter being in the discretion of the chancellor. Hargrave's Note Co. Litt. 88 b (12). Therefore, the relator in the principal case had no legal right to the child. But some courts have contended for the wise principle that in exercising their discretion, they should give preference to relatives. *Allen* v. *Peete* (1852) 25 Miss. 29; *In re Stockman* (1888) 71 Mich. 180, Campbell, J. 194; *Albert* v. *Perry* (1862) 14 N. J. Eq. 540. This consideration was entirely disregarded by the court in the principal case.

EQUITY—EQUITABLE LIENS—FUTURE ACQUIRED PROPERTY.—A bank loaned money for the purchase of goods, the borrower agreeing to insure the goods purchased and assign the policies to the bank as collateral security. *Held*, this agreement operates as an equitable assignment of the policies, valid against subsequent creditors in bankruptcy. *Wilder* v. *Watts* (S. C. 1905) 15 Am. Bank. Rep. 57.

In Massachusetts a mortgage of after-acquired property conveys no lien till the mortgagee takes possession. *Moody* v. *Wright* (Mass. 1847) 13 Met. 17. The New York decisions seem hopelessly confused. *Rochester Distilling Co.* v. *Rasey* (1894) 142 N. Y. 570; *Central Trust Co.* v. *West India Improvement Co.* (1901) 169 N. Y. 314. But by the weight of authority in England and America an equitable lien, valid against subsequent creditors, is created by a contract to convey or assign after-acquired property, *Holroyd* v. *Marshall* (1862) 10 H. L. Cas. 191; *Mitchell* v. *Winslow* (1843) 2 Story 630, or choses in action, *Dunn* v. *Michigan Club* (1897) 115 Mich. 409; *Tailby* v. *Official Receiver* (1888) L. R. 13 App. Cas. 523, the lien attaching to such property as soon as it is acquired by the contractor or assignor. To deprive a mortgagee of the security upon which he advanced his money, allowing the bankrupt's estate the benefit of both, would be clearly inequitable.

EQUITY—JURISDICTION—BOUNDARIES.—The plaintiff, owning a lot between the lots of the two defendants, claimed that one or the other had encroached seven feet eight inches on his lot, and he filed a bill in equity to have the boundary fixed. *Held*, equity has no jurisdiction, there being an adequate remedy at law. *Livingston County Association* v. *Keach* (Ill. 1905) 76 N. E. 72.

The jurisdiction of equity to fix boundaries is of ancient origin, Pomeroy, Equitable Remedies § 694, but since the leading case of *Wake* v. *Conyers* (1759) 1 Eden 331, equity has refused to interpose to settle a controverted boundary, unless there existed some further equitable ground, as fraud, multiplicity, or some peculiar relationship. *Marquis of Bute* v. *Canal Co.* (1845) 1 Phil. Ch. 681; *Wetherbee* v. *Dunn* (1868) 36 Cal. 249; *Boyd* v. *Dowie* (N. Y. 1872) 65 Barb. 237. According to the bill in the principal case, only one of the defendants is wrongfully in possession of the plaintiff's property, and the remedy at law is therefore adequate. *Speer* v. *Crawter* (1816) 2 Mer. 410.

EQUITY—TRADE-MARKS—COMPOSITE GEOGRAPHICAL AND PERSONAL NAME.—The plaintiff with a superintendent, Lynn, manufactured shoes in Auburn, Maine, under the trade name of "Auburn Lynn Shoes, Auburn, Maine." Lynn left the employ of the plaintiff for that of the defendant who then made shoes in Auburn marked "Anburn-Lynn Shoe Co., Auburn, Maine." *Held*, the defendant was liable for an infringement of a technical trade-mark. *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.* (Me. 1905) 62 Atl. 499.

Since any similarity which misleads the public is an infringement of a trade-mark, *Nicholson* v. *Stickney Cigar Co.* (1900) 158 Mo. 158, the defendant's use, in an ordinary way, on his goods, of his own name and his place of business, as it might mislead the public, would constitute an infringement. Such a result would violate a man's right to use a personal or geographical name on his goods, and so be contrary to trade-mark law. *Columbia Mill Co.* v. *Alcorn* (1893) 150 U. S. 460; *Meneely* v. *Meneely* (1875) 62 N. Y. 427. Further, holding the composite name a trade-mark necessarily involves a presumption of fraud against the defendant for exercising his undoubted right to use on his goods his name and place of business, a result contrary even to the law of unfair competition. *Elgin Nat. Watch Co.* v. *Ill. Watch Co.* (1901) 179 U. S. 665, 674. For these reasons the decision is unsound in holding the composite name a trade-mark. The court follows the present American tendency in merging into "unfair trade" the law of trade-marks and unfair competition.

EVIDENCE—ANCIENT PUPLIC DOCUMENTS—SURVEYOR'S REPORT.—The defendant sought to prove that within legal memory certain land had been covered by the sea. Among the old documents which he sought to introduce was a survey taken in 1616 by direction of the then Lord Warden of the harbor, and produced from the Record Office. *Held*, this survey was not admissible as a "public document" because it did not affect the king's property or revenue. *Mercer* v. *Denne* [1905] 2 Ch. 538.

This case seems to carry to its extreme the strict English theory as to the evidential requirements of a public document. See opinion of Blackburn, J., in *Sturla* v. *Freccia* (1880) L. R. 5 App. Cas. 623, 643. The American courts are less exacting, *Shields* v. *Buchanan* (1797) 2 Yeates 219, and have permitted the introduction of an old survey, made by a city surveyor but concededly for a private party. *Blackman* v. *Riley* (1893) 138 N. Y. 318, 329. But see, *Simmons* v. *Spratt* (1884) 24 Fla. 495, 499. However, even in England the courts are less strict as to the evidential requirements for ancient records, 2 Taylor, Evidence 8th. ed. § 1585, and since this survey was of great antiquity and was found in the proper custody, *Gibson* v. *Poor* (1850) 21 N. H. 440, 445 et seq., it is difficult to see why it should not have been admitted as an ancient document. *Smucker* v. *Railroad Co.* (1898) 188 Pa. St. 40.

INTERSTATE COMMERCE ACT—REBATES—CARRIERS AS DEALERS.—The Chesapeake and Ohio Ry. Co. contracted to deliver 60,000 tons of coal to the New Haven Ry. Co. at $2.47 per ton. After deducting the purchase

price and the cost of delivery from the port, only 28 cents was left to pay the freight on the C. & O. Ry., the published tariff being $1.45. The C. & O. Ry. Co. contended that it bore the loss as dealer. *Held*, that the company be enjoined from taking less than the rates fixed in its published tariff by means of dealing in the purchase and sale of coal. *N. Y., N. H. & H. R. R.* v. *Interstate Commerce Commission.* U. S. Supreme Ct., Feb. 19, 1906. See NOTES, p. 266.

LANDLORD AND TENANT—CONTRACT TO REPAIR—LIABILITY TO THIRD PARTIES.—The agent of the landlord of a house, in consideration that the tenant would withdraw a threat to quit, promised to repair a defective floor. Some time afterwards the tenant's wife sustained injury, because of the landlord's failure to repair. *Held*, Mathew L. J. dissenting, the female plaintiff had no cause of action against the landlord. *Cavalier* v. *Pope* [1905] 2 K. B. 757.

In the absence of an express agreement, the occupier, and not the owner of demised premises, is liable to third persons for injuries received because of failure to keep them in repair. *Cheetham* v. *Hampson* (1791) 4 T. R. 318; *Lane* v. *Cox* [1897] 1 Q. B. 415; and see *Reg.* v. *Bucknall* (1703) 2 Ld. Raym. 804. But if the owner expressly agrees to repair, such third persons have been allowed to recover in tort, where there was misrepresentation as to the condition of the premises, *Stenberg* v. *Willcox* (1895) 96 Tenn. 163, 328; *Willcox* v. *Hines* (1897) 100 Tenn. 524, where the landlord has assumed control over the premises, *Leslie* v. *Pounds* (1812) 4 Taunt. 649, and to avoid circuity of action. *Payne* v. *Rogers* (1794) 2 H. Bla. 350. But such third persons cannot recover on the contract, since there is no privity. *Winterbottom* v. *Wright* (1842) 10 M. & W. 109. In the principal case there was no misrepresentation. Neither do the facts show that the landlord assumed control over the premises. The doctrine of *Payne* v. *Rogers*, supra, would not apply, since the plaintiff-wife would have no action in tort against her husband, the tenant. See *Phillips* v. *Barnett* (1876) L. R. 1 Q. B. Div. 436; *Freethy* v. *Freethy* (N. Y. 1865) 42 Barb. 641. The decision of the principal case is in accordance with established anthority, *Burdick* v. *Cheadle* (1875) 26 Ohio St. 393; *Clyne* v. *Helmes* (1898) 61 N. J. L. 358, and seems correct in principle.

LIBEL—DAMAGES FOR MENTAL SUFFERING—PHYSICAL ILLNESS.—In an action for libel, *held*, that mental suffering may be considered in assessing damages, but physical illness resulting therefrom, and consequent pecuniary loss from inability to perform a contract, are too remote. *Butler et ux.* v. *Hoboken Printing and Publishing Co.* (N. J. 1905) 62 Atl. 272.

Future accruing damages, for which in libel no subsequent action can be brought, should be based upon the natural and probable consequences of the published words. Odgers, Libel and Slander 341, and cases cited. But obviously such test has no application to damage that has already accrued, which need only be proximate, that is, the direct, even though surprising, result of the defendant's wrongful act. *Brown and Wife* v. *Rail road Co.* (1882) 52 Wis. 342. Where, as in the principal case, such test is satisfied, the contrary result would seem the preferable, *Zeliff* v. *Jennings* (1884) 61 Tex. 458; Burdick, The Law of Torts 95, on the ground that mental suffering can best be measured by its physical effect. *Newell* v. *Whitcher* (1880) 53 Vt. 589.

MASTER AND SERVANT—ASSUMPTION OF RISK—CONTINUING WORK UNDER FEAR OF DISCHARGE.—The plaintiff, in defendant's employ as a woodworker, was ordered by the foreman to plane certain pieces of wood on a machine. Upon complaining that the work was dangerous, he was ordered to do it "or go home." The plaintiff was injured while doing the

work, without being guilty of contributory negligence. *Held*, the plaintiff did not assume the risk by continuing work. *Wells & French Co.* v. *Kapaczynski* (Ill. 1905) 75 N. E. 751.

Of the well settled exceptions to the doctrine of assumed risk—as to a servant's continuing work for a reasonable time under promise to repair, *Hough* v. *Railway Co.* (1879) 100 U. S. 213, or in reliance upon the master's assurance of safety, *Allen* v. *Gilman* (1904) 127 Fed. 609, or under a peremptory order demanding immediate action, *Railroad Co.* v. *Duffield* (Tenn. 1883) 12 Lea 63, or under physical compulsion, *Thompson* v. *Herman* (1879) 47 Wis. 602—none will cover the principal case. In view of the general refusal of courts to recognize the moral compulsion arising from fear of discharge, *Lamson* v. *Am. Axe & Tool Co*, (1900) 177 Mass. 144; *Reed* v. *Stockmeyer* (1896) 74 Fed. 189, 194, the dissenting opinion, in opposing a further exception on that basis, is unanswerable. The rule, however, seems needlessly severe and a proper subject for legislative action. Shearman & Redfield, Negligence 5th ed. §§ 186, 211.

MUNICIPAL CORPORATIONS—ARBITRARY POWER TO LICENSE.—The Sanitary Code of New York City forbade the selling of milk in the city without a permit from the Board of Health. No limitations were shown to have been placed upon the exercise of this power. *Held*, it was not to be presumed that it would be exercised arbitrarily, since the provision was not a deprivation of liberty or property without due process of law. *The People* v. *Van De Carr* (1905) 26 Sup. Ct. Rep. 144.

This decision follows *Davis* v. *Mass.* (1896) 167 U. S. 43; *Wilson* v. *Eureka City* (1898) 173 U. S. 32, and also represents the law in some of the state courts. *Quincy* v. *Kennard* (1890) 151 Mass. 563. But the majority of the state courts adhere to the view that such ordinances are void under the Fourteenth Amendment, since they confer arbitrary power to deprive one citizen of the liberties enjoyed by another. *State* v. *Deering* (1893) 84 Wis. 585; *State* v. *Mahner* (1891) 43 La. Ann. 496. That these two conflicting applications of the principles of the Fourteenth Amendment can exist side by side is due to the fact that no appeal lies from the decision of the state court declaring a statute or ordinance unconstitutional.

PARTNERSHIP – LIABILITY FOR UNAUTHORIZED TORT OF A PARTNER. —Defendants were copartners in conducting a department store. The manager of their shoe department, suspecting the plaintiff of stealing, arrested her, and having detained and searched her in the presence and under the direction of one of the members of the firm, found nothing. In an action for damages it was *held* that the other partner was not liable. "One partner has no power to bind the firm to the commission of a wrongful act without the previous consent or subsequent concurrence of the partners." *Bernheimer Bros.* v. *Becker* (Md. 1905) 62 Atl. 526. See NOTES, p. 264.

PLEADING AND PRACTICE—CIVIL CONTEMPT—ABATEMENT.—A surrogate's decree directed the contemnor, as executrix, to pay a sum of money to a trust company within twenty days. Upon her failure to do so the trust company instituted contempt proceedings, but before final decision the trust company was dissolved. *Held*, the proceeding abated with the dissolution of the company and the decision was vacated. *In re Skelly* (1905) 109 App. Div. 58.

Although the power of a surrogate to punish for contempt the nonpayment of a money decree has been doubted, *In re Bingham* (1859) 32 Vt. 327; *Matter of Watson* v. *Nelson* (1877) 69 N. Y. 536, it has been upheld where payment is ordered out of a specific fund in the hands of a guardian, *Seaman* v. *Duryea* (1854) 11 N. Y. 324, or an executor. *People* v. *Marshall* (N. Y. 1877) 7 Abb. N. C. 380. But since the basis of a civil proceeding for contempt is the protection of individual interests, *People* v. *Oyer*

& *Terminer* (1886) 101 N. Y. 245, the power should not be exercised therein when such interests no longer exist. *Pelzer* v. *Hughes* (1887) 27 S. C. 408. Accordingly, though the court by a proper proceeding might have punished the defendant in the principal case for criminal contempt in wilfully disobeying its lawful mandate, N. Y. Code Civ. Proc. § 3343, sub. 7; *Berzen* v. *Epstein* (N. Y. 1901) 58 App. Div. 304, 309, the decision was properly vacated.

PLEADING AND PRACTICE—DEATH BY WRONGFUL ACT—TIME OF ACCRUAL.—A statute provided that action for wrongful death should be brought "within one year after the cause of action therefor shall have accrued." This action was not begun until nearly two years after the death, though less than a year after the appointment of the administrator. The defendant pleaded the statute of limitations. *Held*, the cause of action did not accrue until the appointment of the administrator. *Crapo* v. *City of Syracuse* (1906) 183 N. Y. 395.

Theoretically, the cause of action cannot accrue to the administrator at the death, because there is then no administrator to possess the requisite primary right; nor at his appointment, because the duty cannot exist until then, and the breach being the death, there would result the anomaly of a breach of a duty arising before the duty itself. In the ordinary case of an administrator suing for injuries to the estate inflicted between the testator's death and the appointment, this difficulty is overcome by the fiction that his appointment relates back to the death of his intestate. Woerner, American Law of Administration § 173. While under this theory the cause of action would accrue at the particular breach, in the principal case at the death, yet it is settled that the cause of action in the ordinary case does not accrue until the appointment. *Murray* v. *East India Co.* (1821) 5 B. & A. 204; *Bucklin* v. *Ford* (N. Y. 1849) 5 Barb. 393. The principal case extends the ordinary rule, undisputed where the administrator sues for the estate, to cases where he sues for beneficiaries. *Andrews* v. *Railroad Co.* (1867) 34 Conn. 57; Tiffany, Death by Wrongful Act § 122. For a criticism based on the legislative intent, see 5 COLUMBIA LAW REVIEW 165.

PLEADING AND PRACTICE—DISQUALIFICATION OF A JUDGE.—The judge before whom the petitioner was tried was a depositor in a bank, for embezzling the funds of which the petitioner was indicted. *Held*, the judge was disqualified to try the petitioner. *Ex parte Cornwell* (Ala. 1905) 39 So. 354.

While mere tendency to favor, or possibility of bias, will not ipso facto disqualify a judge, *Queen* v. *Rand* (1866) L. R. 1 Q. B. 230; *Inhabitants of Northampton* v. *Smith* (Mass. 1846) 11 Metc. 390, he may be disqualified if he is so personally interested in the controversy as to have a real bias in the matter, *Queen* v. *Meyer* (1875) L. R. 1 Q. B. D. 173; *Medlin* v. *Taylor* (1892) 101 Ala. 239; *Moses* v. *Julian* (1863) 45 N. H. 52, and the slightest pecuniary interest is always sufficient. *Pearce* v. *Atwood* (1816) 13 Mass. 324. If, in the principal case, the action had been for money had and received, the judge would have been disqualified by reason of his pecuniary interest, *Adams* v. *Minor* (1898) 121 Cal. 372, and it would seem that an equal degree of impartiality and freedom from personal bias should be required in a criminal trial. See *Jordan* v. *Henry* (1875) 22 Minn. 245. Contra, *Davis* v. *State* (1876) 44 Tex. 523.

PUBLIC SERVICE COMPANIES—PUBLIC INTEREST—WHAT CONSTITUTES.—A telegraph company, in connection with its other business, engaged in buying up quotations of prices from a board of trade and selling them to those requiring such quotations. *Held*, that the carrying on of such business for the period of ten years, so as to make such quotations necessary to the successful conduct of business, was sufficient to impress

the system of supplying them with a public interest and the company would be subject to the rules governing public service companies. *Western Union Telegraph Co.* v. *State ex rel. Elevator Co.* (Ind. 1905) 76 N. E. 100. See NOTES, p. 259.

REAL PROPERTY—EXECUTED PAROL LICENSE—REVOCABILITY.—The owner of land granted to the plaintiff a parol license to construct a building on a portion of the premises. The plaintiff constructed the building, and the land was subsequently conveyed to the defendant. *Held*, the fact that the plaintiff had executed the license by the expenditures made, did not render the license irrevocable, and the conveyance of the land to the defendant was ipso facto a revocation of the license. *Shipley* v. *Fink* (Md. 1905) 62 Atl. 360.

It is well settled law that a conveyance of land, upon which a parol license has been granted, operates to revoke such license. *Wallis* v. *Harrison* (1838) 4 M. & W. 538. It has been held that an executed parol license cannot be revoked. *Rerick* v. *Kern* (Pa. 1826) 14 S. & R. 267. But the better view is that such a license may be revoked, since to hold otherwise would, in effect, be granting a permanent easement in real estate by parol. *Housten* v. *Laffee* (1866) 46 N. H. 505. The decision of the principal case is in accord with the view previously contended for in 1 COLUMBIA LAW REVIEW 549; 4 id. 381.

REAL PROPERTY—PARTITION—EASEMENTS BY IMPLICATION.—The plaintiff and the defendant, as tenants in common of two adjoining buildings, partitioned the property, the dividing line running through the centre of a stairway and drain pipe. The plaintiff insisted he had as to both an easement over the defendant's property which the latter had disturbed. *Held*, there being no express grant or reservation of such easements, and they not being reasonably necessary to the enjoyment of the estate, none existed. *Gaynor* v. *Bauer* (Ala. 1905) 39 So. 749.

The better view with regard to easements by implication is that they need be only reasonably necessary to the estate granted to create an implied grant, *Ewart* v. *Cochrane* (1861) 4 Macqueen 117; *Paine* v. *Chandler* (1892) 134 N.Y. 385, but must be strictly necessary to the estate reserved to create an implied reservation. *Wheeldon* v. *Burrows* (1878) L. R. 12 Ch. Div. 31; *Mitchell* v. *Seipel* (1879) 53 Md. 251. Which rule should be applied to cases of partition by tenants in common seems never to have been squarely decided. In the case of a partition among heirs it has been held that the rule of reasonable necessity should apply, *Ellis* v. *Bassett* (1890) 128 Ind. 118, the courts conceding that something more should pass by implication under a partition than under a sale to a stranger. *Goodall* v. *Godfrey* (1880) 53 Vt. 219. This view finds support in some of the cases involving contemporaneous grants of both estates to the grantor's children, it being held that such transactions are in effect two grants to which the rule of reasonable necessity must be applied. *Baker* v. *Rice* (1897) 56 Ohio St. 463; contra, where the contemporaneous grants were to strangers. *Warren* v. *Blake* (1866) 54 Me. 276.

SALES—BREACH OF WARRANTY—WAIVER.—The defendant purchased dextrine from the plaintiff under a warranty as to its fitness for dyeing purposes. He continued to use the first lot after discovering its unfitness, and later bought a second lot of which he used a part. *Held*, the defendant had waived the warranty and had no set off for its breach. *Ducas* v. *American Dyeing Co.* (1905) 95 N. Y. Supp. 590.

Whether a legal right has been waived is a question of fact for the jury. *Fox* v. *Harding* (Mass. 1851) 7 Cush. 516. Since a warranty is a collateral agreement, *Fairbank Canning Co.* v. *Metzger* (1890) 118 N. Y. 260, which, being broken, gives the right to retain the goods and sue for

damages, *Underhill* v. *Wolf* (1890) 131 Ill. 425, and this without any notice to the seller, of the defect, *Tacoma Coal Co.* v. *Bradley* (1891) 2 Wash. 600, it would seem that the continued use of the first lot of goods in the principal case would not constitute a waiver. See *The Burlington and Mo. R. R. Co.* v. *Boestler* (1864) 15 Iowa 555. Although the ordering of the second lot might constitute a waiver by estoppel, *Royal* v. *The Aultman and Taylor Co.* (1888) 116 Ind. 424, 427, yet the court should have sent the question to the jury.

SALES—WARRANTY—DAMAGES FOR PERSONAL INJURIES.—The defendant sold a corn-husking machine to the plaintiff with a warranty that it would do good work, was well made, and of good materials. Because of a defect, a "safety lever," for stopping the machine, failed to work and the plaintiff was injured. *Held*, the warranty was a general one, contemplating only that damage which might arise from a failure of the machine to husk corn. *Birdsinger* v. *McCormick Harvesting Machine Co.* (1906) 34 N. Y. L. Jour. 1603.

Special damages for breach of warranty, if the natural consequence of the particular defect which constitutes the breach, will be given as within the contemplation of the parties. *Hammond* v. *Bussey* (1887) L. R. 20 Q. B. D. 79; *Dushane* v. *Benedict* (1886) 120 U. S. 630. Contrary to the English rule, *Mowbray* v. *Merryweather* [1895] 2 Q. B. 640, the courts of this country do not ordinarily consider in contracts of warranty, that personal injuries are within the contemplation of the parties, *Rich* v. *Smith* (N. Y. 1884) 34 Hun 136, unless there is an express special warranty, *Tyler* v. *Moody* (1901) 111 Ky. 406; *Bruce* v. *Fiss D. and C. Horse Co.* (N.Y. 1900) 47 App. Div. 273, or actual deceit. *Jones* v. *Ross* (1892) 98 Ala. 448. But see *Boston Woven Hose and R. Co.* v. *Kendall* (1901) 178 Mass. 232. The principal case would seem to be unsound in not submitting to the jury the question whether the injuries were the natural result of the untruth of the warranty of good material.

TAXATION—CONSTITUTIONAL LAW—SITUS OF CREDITS.—A Pennsylvania corporation, through its agent in Louisiana, sold coal there and accepted in payment duebills which remained in the hands of the agent. *Held*, these credits might be taxed in Louisiana. *Monongahela River etc. Co.* v. *Board of Assessors* (La. 1905) 39 So. 601.

Credits have always been taxable at the domicile of the creditor, *Kirtland* v. *Hotchkiss* (1879) 100 U. S. 491, and not at that of the debtor. *State Tax on Foreign-Held Bonds* (1872) 15 Wall. 300. But the tendency of recent decisions, as noted in the principal case, is toward assigning to credits a situs apart from the creditor's domicile whenever such a construction is possible. Thus if the credits are controlled by an agent domiciled in the same state as the debtor, they are taxable there; *Bristol* v. *Washington Co.* (1900) 177 U. S. 133; or if they consist of notes, bonds, etc., they are taxable where such are held. *New Orleans* v. *Stempel* (1899) 175 U. S. 309; *Assessors* v. *Comptoir National* (1903) 191 U. S. 388. Similarly other forms of intangible personal property, depending for their value upon the use of tangible property, are taxable where such tangible property is located. *Adams Express Co.* v. *Ohio* (1897) 165 U. S. 194, 166 U. S. 185. Cf. also 5 COLUMBIA LAW REVIEW 50; 6 id. 190; Judson, Taxation §§ 408, 422, 427.

TORTS—NUISANCES—EXHIBITIONS OF FIREWORKS.—The defendant was conducting a licensed exhibition of fireworks in a city park. The case of a discharged rocket, weighing about a pound, in falling struck and injured the plaintiff, a spectator standing in an adjoining street. *Held*, that such a nuisance was not a nuisance per se and that the jury should determine if sending up a rocket case of such weight constituted negligence under the

circumstances. *Crowley* v. *Rochester Fireworks Co.* (1906) 34 N. Y. L. Jour. 1303.

The term " nuisance per se " can be properly applied only where the thing is itself unlawful irrespective of whether it caused such injury as would make of a lawful business a nuisance in fact. *King* v. *Betterton* (1694 5 Mod. 142; *Windfall Mfg. Co.* v. *Patterson* (1897) 148 Ind. 414, 420. It is incorrectly applied to facts making a prima facie case of nuisance. *Jennie* v. *Sutton* (1881) 43 N. J. L. 257. The principal case is sound both in holding there is no nuisance per se and in sending the case to the jury; see *Landau* v. *City of New York* (1904) 180 N. Y. 48; but its dictum that fireworks in a city street constitute a nuisance per se is unsound and contrary to that in *Speir* v. *City of Brooklyn* (1893) 139 N. Y. 6, 11. But see *Conklin* v. *Thompson* (N. Y. 1859) 29 Barb. 218.

WATERS AND WATER COURSES—OYSTER FISHERIES—NAVIGATION.—A state statute gave owners on navigable waters the exclusive right to cultivate oyster beds within six hundred yards of the shore. The plaintiff, who owned land on both sides of the entrance to a bay, which entrance was less than twelve hundred yards wide, planted oyster beds, leaving only a narrow channel. *Held*, defendant's boat must follow the channel. *Cain* v. *Simonson* (Ala. 1905) 39 So. 571.

At common law the public right of navigation to high-water mark was paramount to all other rights in navigable waters, *Williams* v. *Wilcox* (1838) 8 Ad. & El. 318; *Atty. Gen.* v. *Woods* (1871) 108 Mass. 436, and redress for damage to fisheries caused by navigators was restricted to cases of negligence or wilfulness. *Colchester* v. *Brook* (1845) 7 Q. B. 339. But the power of the legislature to limit channels or otherwise regulate navigation is unquestioned. *Flanagan* v. *City of Philadelphia* (1862) 42 Pa. St. 219, and cases there cited. It would seem therefore not unreasonable to imply in the plaintiff a right to prevent unnecessary navigation which was injurious to the fishery privileges that the statute conferred.

WILLS—PROBATE IN A FOREIGN JURISDICTION.—A resident of California, while sojourning in New Hampshire, executed a will in accordance with the laws there and later died in California owning lands situated in both states. The will was probated in New Hampshire and probate was requested of the same will in California on an exemplified copy. *Held*, this was not a foreign will within the meaning of the code and must be probated originally in California. *In re Clark's Estate* (Cal. 1905) 82 Pac. 760. See NOTES, p. 269.